Duquesne Law Review

Volume 26 | Number 3 Article 11

1988

Hague Convention on Taking Evidence Abroad - Federal Rules of Civil Procedure - Discovery

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Recommended Citation
Michael P. Lehutsky, *Hague Convention on Taking Evidence Abroad - Federal Rules of Civil Procedure - Discovery*, 26 Duq. L. Rev. 773 (1988).
Available at: https://dsc.duq.edu/dlr/vol26/iss3/11

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HAGUE CONVENTION ON TAKING EVIDENCE ABROAD—FEDERAL RULES OF CIVIL PROCEDURE—DISCOVERY—The United States Supreme Court has held that the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters provides optional procedures for conducting discovery in a foreign nation to which American courts may resort if, after a particularized comity analysis, they deem it necessary.

Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa, 107 S. Ct. 2542 (1987).

The petitioners, Societe Nationale Industrielle Aerospatiale and Societe de Construction d'Avions de Tourism, are French corporations owned by the Republic of France[1] and are engaged in the business of designing, manufacturing and distributing airplanes.[2] On August 19, 1980 a plane produced by the petitioners[3] crashed in New Virginia, Iowa resulting in injuries to the plaintiffs, Dennis Jones, John George, and Rosa George.[4] Each plaintiff filed suit advancing theories of negligence, strict products liability and breach of warranty.[5] All three actions were consolidated in the district court[6] and, with the parties' consent, were referred to a magistrate pursuant to

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1. Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa, 107 S. Ct. 2542 (1987). "Petitioner Societe de Construction d'Avions de Tourism is a wholly owned subsidiary of Societe Nationale Industrielle Aerospatiale." *Id.* at 2546 n.2.

2. *Id.* at 2546.

3. *Id.* The plane, marketed by the name "Rallye" had been advertised in American aviation magazines as the "World's safest and most economical STOL [short take-off and landing] plane." *Id.*

4. *In Re* Societe Nationale Industrielle Aerospatiale, 782 F.2d 120, 122 (8th Cir. 1986). "Although the district court is the nominal respondent in this mandamus proceeding, plaintiffs are the real parties in interest." 107 S. Ct. at 2546 n.5.

5. Brief for Respondent and Real Parties in Interest at 2, Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa, 107 S. Ct. 2542 (1987).

6. 782 F.2d at 122.

federal law.[7] In August of 1983 the plaintiffs served their first request for the production of documents[8] to which the petitioners responded, at least to the extent that the requested documents were in the United States.[9] Plaintiffs served interrogatories, additional requests for production and admissions to which the petitioners responded with a motion for a protective order.[10]

The French corporations based their contention on the applicability of the Multilateral Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (Hague Convention).[11] Petitioners first asserted that since the information sought was located in France, the Hague Convention, and not the Federal Rules of Civil Procedure, must control the plaintiffs' discovery attempts.[12] Invoking French law,[13] the petitioners argued that they could not comply with the request under the Federal Rules of Civil Procedure without subjecting

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7. 107 S. Ct. at 2546. 28 U.S.C. § 636(c)(1) provides:

> Not withstanding any provision of law to the contrary—(1) Upon consent of the parties, a full-time United States magistrate or part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case, when specifically designated to excercise such jurisdiction by the district court or courts he serves. . . .

8. Brief for the Respondent and Real Parties in Interest at 2. Plaintiffs sought production of the pilot's handbook and flight manual as well as performance data and testing records of the plane involved. *Id.*

9. 107 S. Ct. at 2546 n.4.

10. 782 F.2d at 123.

11. *Opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444. "The United States, the Republic of France, and 15 other nations have acceded to the Hague Convention on Taking Evidence Abroad in Civil and Commercial Matters . . . . This Convention—sometimes referred to as the 'Hague Convention' or the 'Evidence Convention'—prescribes certain procedures by which a judicial authority in one contracting State may request evidence located in another contracting State." 107 S. Ct. at 2545.

12. 782 F.2d at 123.

13. French Penal Code Law No. 80-538 reads:

> Article 1A. Subject to treaties and international agreements and applicable laws and regulations, it is prohibited for any party to request, seek or disclose, in writing, orally or otherwise, economic, commercial, industrial, financial, or technical documents or information leading to the constitution of evidence with a view to foreign judicial or administrative proceedings or in connection therewith . . . .
>
> Article 2. The parties mentioned in Articles 1 and 1A shall forthwith inform the competent minister if they receive any request concerning such disclosures . . . .
>
> Article 3. Without prejudice to heavier penalties prescribed by law, any breach of Articles 1 and 1A of this Act shall be punished by imprisonment for two to six months and a fine of 10,000 to 120,000 or either.

themselves to criminal liability in France.[14] Petitioners concluded that the applicability of the French Blocking Statute required that the plaintiffs' discovery proceed exclusively in accordance with the provisions of the Hague Convention.[15] The plaintiffs contended that since the court had obtained in personam jurisdiction over the petitioners, the applicability of the Hague Convention was nullified.[16] Additionally, they argued that the interpretation ascribed to the Convention by the courts of this country rendered its procedures inapplicable to discovery situations in which evidence was not to be taken in a foreign nation.[17]

In reviewing the petitioners' motion the magistrate relied heavily upon the reasoning of the Court of Appeals for the Fifth Circuit in *In re Anschuetz & Co.*[18] and denied the protective order.[19] The magistrate noted that the Hague Convention and the Federal Rules of Civil Procedure must both be enforced in the absence of a direct conflict[20] and acknowledged that principles of international comity must be taken into account.[21] Recognizing that, if applied, the French Blocking Statute would compel the use of the Convention procedures, the magistrate ruled that an American court may order any party who is subject to its jurisdiction to comply with discovery under the Federal Rules of Civil Procedure.[22] In justifying this conclusion he stated:

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14. 782 F.2d at 123.

15. Petition for a Writ of Certiorari at 18a.

16. *Id.* at 12a.

17. *Id.* at 16a.

18. 754 F.2d 602 (5th Cir. 1985). In this case, an action was brought as a result of a collision between several boats. The defendant, a foreign company, sought a protective order on grounds similar to those profferred in this case. The Fifth Circuit held that the Hague Convention is not applicable to the production of evidence in this country by a party subject to the court's jurisdiction. *Id.* at 615.

19. Petition for a Writ of Certiorari at 25a. The magistrate ordered discovery as follows:

> 1) Defendant shall answer the interrogatories propounded by the plaintiffs and respond to plaintiffs' request for admissions and for production of documents on or before October 1, 1985.
>
> 2) If discovery depositions are to be undertaken, the court will require compliance with the Hague Evidence Convention if such depositions are to be taken in France, based on the court's understanding of the current law.

Id.

20. *Id.* at 18a.

21. *Id.* at 16a.

22. *Id.* at 17a. The magistrate held, "A finding that the production of documents is precluded by foreign law does not conclude a discovery dispute. A United States court has the power to order any party within its jurisdiction to testify or produce documents regardless of a foreign sovereign's views to the contrary." *Id.*

> Treaties should be construed so as to effect their purposes . . . , and to be as consistent, insofar as possible, with coexisting statutes . . . . The goal of the Hague Convention was to facilitate and increase the exchange of information between nations. It would not serve this goal to transform its provisions into a means to frustrate the discovery process. We conclude, therefore, that this court is not required to defer to the the French Statute by virtue of the Hague Convention.[23]

Further, the magistrate adopted the view of the court in *Graco v. Kremlin, Inc.*[24] that the Convention was inapplicable because the discovery did not require any proceedings to be conducted in France.[25] Furthermore, if the treaty were to be applied it would produce the undesirable results of involving two judicial systems in the lawsuit,[26] thereby increasing the likelihood of disrupting international relations[27] and compelling American courts to surrender jurisdiction.[28] In addressing the petitioners' argument that they would be subjected to criminal sanctions in France if they were to produce the requested information, the magistrate noted that the purpose of the French Blocking Statute was to impede the enforcement of United States Anti-Trust laws[29] and there were no indications that it was intended to affect litigation preparations.[30] Applying *Soletanche and Rodio, Inc. v. Brown and Lambrecht Earth Movers, Inc.*,[31] the magistrate

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23. *Id.* at 18a (citations ommitted).

24. 101 F.R.D. 503 (N.D. Ill. 1984). During discovery in an action for patent infringement the French defendant invoked the Hague Convention to support a motion for a protective order. The court held that discovery does not take place abroad merely because the information is located in a foreign country. *Id.* at 521.

25. Petition for a Writ of Certiorari at 21a.

26. *Id.*

27. *Id.* Quoting *Graco* the magistrate stated, "Trying (or pre- trying) a case in two different countries' courts is not a desirable way of handling routine litigation. Involving two judicial systems in a single lawsuit is as likely to disrupt international relations as it is to promote them, especially when the two systems are brought together for discovery purposes." *Id.*

28. *Id.* Again quoting *Graco*, the magistrate added, "Either American courts would surrender jurisdiction by treating the decisions of foreign authorities as final and unreviewable, or they would invite endless motions and real international friction by second-guessing those decisions." *Id.*

29. *Id.* at 22a.

30. *Id.* at 23a.

31. 99 F.R.D. 269 (N.D. Ill. 1983). In a suit for patent infringement a French plaintiff argued that compliance with a discovery request would subject it to liability under French Penal Code Law No. 80-538. The court held that the possibility of criminal liabilty does not automatically bar a court from ordering discovery, but that a court must balance the interests of both sides, considering the interests of each State, the nature and extent of the hardship on the party, the extent to which discovery is to occur in another nation, and the effectiveness of enforcement in acheiving compliance. Petiton for a Writ of Certiorari at 23a.

balanced the interests of France and the risks to the petitioners against the interests of the United States,[32] thus concluding that American interests should prevail.[33]

Upon this initial defeat, the petitioners applied to the United States Court of Appeals for the Eighth Circuit for a writ of mandamus.[34] Embracing the Fifth Circuit's rationale in *Anschuetz*, the court held the better rule to be that the Hague Convention does not apply to the production of evidence which is in the possession of a foreign litigant over whom the court has jurisdiction, even if the evidence sought is in a foreign nation.[35] The foreign corporations argued that principles of international comity required, at the very least that resort must first be made to the procedures of the Hague Convention, and that the Federal Rules of Civil Procedure be used as a back-up should the Hague procedures fail.[36] In rejecting this argument the court, again adopting the views expressed in *Anschuetz*, held that to allow a foreign court to rule on an issue only to have an American court override its decision would be a tremendous insult to the nation's sovereignty[37] as well as a defeat for the principles of international comity.[38]

In reviewing the magistrates ruling regarding the French Blocking Statute, the court of appeals applied a two-step analysis.[39] First, the

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32. Petition for a Writ of Certioari at 23a-24a. The magistrate summed the intersts involved as follows:

> The vital national interest in this case is protection of United States citizens from harmful foreign products and compensation for injuries caused by such products. France's interest is protection of their citizens from intrusive foreign discovery procedures; however, it does not appear that France has strictly enforced the law. Defendants face no extraordinary hardship at this point . . . . The required conduct does not have to take place in France . . . .

Id.

33. *Id.* at 25a. The magistrate stated: "To permit the Hague Evidence Convention to override the Federal Rules of Civil Procedure would frustrate the courts' interests, which particularly arise in products liability cases . . . . As to defendants' argument of illegality, this Court determines that the United States interests are stronger than potential French interests, given no strong evidence that Law No. 80-538 is strictly enforced." *Id.*

34. 782 F.2d at 120. The court noted that mandamus review of interlocutory discovery orders is limited, but would be allowed in this case because of the novelty, importance, and likely recurrence of the problem presented. *Id.*

35. *Id.* at 124.

36. *Id.* at 125.

37. *Id.* at 125-26. Quoting *In re Anschuetz* the court stated, "[T]he greatest insult to a civil law country's sovereignty would be for American courts to invoke the foreign country's judicial aid merely as a first resort, subject to the eventual override of their rulings under the Federal Rules of Civil Procedure." *Id.*

38. *Id.* at 126.

39. *Id.*

court examined whether the magistrate was correct in ordering the petitioners to comply with the discovery request.[40] After affirming the magistrate's decision,[41] the court examined whether sanctions could be imposed upon the foreign litigants for failure to comply.[42] While acknowledging that the petitioners' good faith attempts at compliance should be considered in determining any sanctions which would be imposed,[43] the court concluded that the issue was not yet ripe for determination.[44]

The most interesting aspect of the court of appeals' opinion is found in its response to the petitioners' argument that enforcing the Federal Rules of Civil Procedure in this case would render the Hague Convention meaningless. Seizing a passage from *Graco*,[45] the court noted, "the Hague Convention will continue to provide useful, if not mandatory, procedures for discovery abroad from foreign non-parties who are not subject to an American court's jurisdiction and compulsory powers."[46]

The United States Supreme Court granted the petitioners' request for a writ of certiorari on June 9, 1986.[47] The issue on appeal was to what extent a federal court must apply the procedures of the Hague Convention when a litigant seeks discovery from a foreign adversary over whom the court has jurisdiction.[48] Justice Stevens,

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40. *Id.*

41. *Id.* The court stated, "The magistrate properly recognized that '[t]he fact that foreign law may subject a person to criminal sanctions in the foreign country if he produces certain information does not automatically bar a domestic court from compelling production'" *Id.* (citations omitted).

42. *Id.* at 127.

43. *Id.*

44. *Id.* The court determined:

> The record before this court does not indicate whether the petitioners have notified the appropriate French Minister of the requested discovery in accordance with Article 2 of the French Blocking Statute, or whether the petitioners have attempted to secure a waiver of prosecution from the French government . . . . [T]hese issues will only be relevant should the petitioners fail to comply with the magistrate's discovery order, and we need not presently address them.

Id.

45. *Id.* at 125. The court in *Graco* had said: "Two important purposes of an international convention of this type relate to discovery of non-parties, and would justify the Convention's existence regardless of how the Convention is deemed to apply with respect to parties before the court." 101 F.R.D. at 520.

46. 782 F.2d at 125 (emphasis added).

47. Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa, U.S. , 106 S. Ct. 2888 (1986).

48. 107 S. Ct. at 2546.

speaking for a divided Court,[49] affirmed the decision of the court of appeals in part and reversed it in part.[50] In affirming the lower court's opinion, the majority found that interpreting the Hague Convention as the exclusive means for conducting foreign discovery or requiring litigants to make mandatory first resort to the treaty's procedures would be inconsistent with the language and negotiating history of the document.[51] To support its decision of non-exclusivity the Court found the following facts significant: the absence of mandatory language in the preamble of the Convention;[52] the fact that Article 23 of the Convention allows a foreign nation to refuse to execute Letters of Request;[53] and, that Article 27 allows a signatory state to provide more liberal procedures for obtaining evidence than those authorized by the Convention.[54] Further, the majority reasoned that a rule of exclusivity of the Convention's procedures would

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49. *Id.* at 2542. Justice Stevens was joined by Chief Justice Rehnquist and Justices White, Powell and Scalia. Justice Blackmun joined by Justices Brennan, Marshall and O'Connor concurred only as to the Convention's non-exclusivity and applicabiltiy to parties under the Court's jurisdiction. *Id.* at 2545.

50. *Id.* at 2548. The majority affirmed the court of appeals finding that the Hague Convention did not provide the exclusive means of discovery, *id.*, but reversed its finding that the treaty was applicable only to discovery sought from non-litigant witnesses over whom the court had no jurisdiction. *Id.* at 2554.

51. *Id.* at 2550.

52. *Id.* The Preamble to the Hague Convention states:

> The States signatory to the present Convention, [d]esiring to facilitate the transmission and execution of Letters of Request and to further the accomodation of different methods which they use for this purpose, [d]esiring to improve mutual judicial co-operation in civil or commercial matters, [h]ave resolved to conclude a Convention to this effect and have agreed upon the following provisions— . . . .

23 U.S.T. at 2557.

53. 107 S. Ct. at 2552. Article 23 of the Hague Convention provides:

> A contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

23 U.S.T. at 2568.

54. 107 S. Ct. at 2552. Article 27 of the Hague Convention provides:

> The provisions of the present convention shall not prevent a contracting State from— . . .
>
> (b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;
>
> (c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

23 U.S.T. at 2569.

The Court also noted the use of "may" in Articles 1, 15, 16, and 17. 107 S. Ct. at 2551.

subject American courts to the internal laws of foreign States[55] and create what the court referred to as "three unacceptable asymmetries".[56]

In rejecting a rule of mandatory first resort, Justice Stevens declined acceptance of the lower court's theory that the possible overriding of a foreign court's decision would be an insult to that nation's sovereignty, reasoning foreign courts must recognize the final decision on such discovery matters rests with American courts.[57] The majority's decision was based instead upon a recognition that the Convention's procedures could be overly expensive and slow,[58] less likely to produce results,[59] and inconsistent with American judicial interests in the inexpensive and speedy determination of issues.[60]

The majority noted that a third interpretation of the Hague Convention could be that its procedures are optional, but that international comity requires they be attempted first.[61] The Court rejected this possibility, holding that if any such duty existed, it should have been clearly described in the treaty.[62] The majority, however, did not

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55. *Id.* at 2553.

56. *Id.* n.25. Justice Stevens reasoned:

> The opposite conclusion would create three unacceptible asymmetries. First, within any lawsuit between a national of the United States and a national of another contracting party, the foreign party would obtain discovery under the Federal Rules of Civil Procedure, while the domestic party would be required to resort first to the procedures of the Hague Convention . . . . Second, a rule of exclusivity would enable a company which is a citizen of another contracting State to compete with a domestic company on uneven terms, since a foreign company would be subject to less extensive discovery procedures in the event that both companies were sued in an American court . . . . Third, since a rule of first use of the Hague Convention would apply in cases in which a foreign party is a national of a contracting State, but not to cases where a foreign party is a national of any other foreign State, the rule would confer an unwarranted advantage on some domestic litigants over others similarly situated.

Id.

57. *Id.* at 2554-55.

58. *Id.* at 2555.

59. *Id.*

60. *Id.* The Court stated:

> In many situations the Letter of Request procedure authorized by the Convention would be unduly time consuming and expensive, as well as less certain to produce the needed evidence than direct use of the Federal Rules. A rule of first resort in all cases would therefore be inconsistent with the overriding interest in the "just, speedy, and inexpensive determination" of litigation in our courts.

Id. (citations omitted).

61. *Id.* at 2550.

62. *Id.* at 2554-55.

completely ignore the principles of comity and ultimately held that the Hague Convention provides optional procedures for obtaining evidence from a litigant or any witness[63] any time a court may deem such a course appropriate after applying a particularized comity analysis.[64] Specifically this analysis takes into account: the particular facts of each case; the sovereigns' interests; the likelihood that the Hague procedures will be successful;[65] and the burdensome or intrusive character of the discovery sought.[66]

While agreeing with the majority that the Hague Convention did not provide the exclusive means for conducting discovery abroad,[67] and that it extended to discovery sought from litigants as well as non-party witnesses,[68] Justice Blackmun strongly disagreed with the majority's adoption of a case-by-case comity analysis and the Court's failure to provide an adequate standard to aid the lower courts in the analysis.[69] The minority reasoned that the purpose of the Con-

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63. *Id.* at 2554.

64. *Id.* at 2555. Other factors the Court considered relevant include:

1) The importance to the litigation of the documents or other information requested;
2) The degree of specificity of the request;
3) Whether the information originated in the United States;
4) The availability of alternative means of securing the information; and
5) The extent to which non-compliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the State where the information is located.

Id.

65. *Id.* at 2556.

66. *Id.* at 2557. The Court held the French Blocking Statute was not binding upon American courts, but was "relevant to the court's particularized comity analysis only to the extent that its terms and its enforcement identify the sovereign's interest in nondisclosure." *Id.* at 2556 n.29.

67. *Id.* at 2558.

68. *Id.* The dissent also agreed that no distinction should be made between evidence located "abroad" and that within the possession or control of the litigants. *Id.*

69. *Id.* Justice Blackmun stated:

> Some might well regard the Court's decision as an affront to the nations that have joined the United States in ratifying the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters [citation ommitted]. The Court ignores the importance of the Convention by relegating it to an "optional" status, without acknowledging the significant achievement in accomodating divergent interests that the Convention represents. Experience to date indicates that there is a large risk that the case-by- case comity analysis now to be permitted by the Court will be performed inadequately and that the somewhat unfamiliar procedures of the Convention will be invoked infrequently. I fear the Court's decision means that courts will resort unnecessarily to issuing discovery orders under the Federal Rules of Civil Procedure in a

vention was to eliminate the conflicts which arose as the result of great differences between United States discovery procedures and the judicially conducted discovery of civil law nations.[70] Further, the dissent noted, at the time the treaty was signed foreign nations already enjoyed the informality of discovery under the Federal Rules of Civil Procedure,[71] and had nothing to gain by signing the Hague Convention if its provisions were to be optional.[72]

Justice Blackmun's opinion attacked the majority's balancing test on the grounds that unlike usual discovery questions, international discovery required the courts to weigh and determine foreign interests—a task they are not equipped to do.[73] Additionally, the dissent determined that the Hague Convention represented a political balancing of sovereign interests which should not be questioned.[74] Finally, the minority argued, the balancing test was susceptible to a pro-forum bias,[75] and, since appellate review of interlocutory orders is limited, it is unlikely errors will be corrected.[76] The minority also questioned Justice Stevens' reading of Article 27 of the Convention, arguing that it could only be read as applying to the nation receiving a discovery request.[77] The dissent further accused the majority of

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raw exercise of their jurisdictional power to the detriment of the United States' national and international interests.

Id. at 2557-58.

70. *Id.* at 2558-59.

71. *Id.* at 2559. The minority opinion stated: "In 1964 Rule 28(b) of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 1781 and 1782 were amended to offer foreign countries and litigants, without a requirement of reciprocity, wide judicial assistance on a unilateral basis for the obtaining of evidence in the United States." *Id.* at 2548 n.13.

72. *Id.* at 2559.

73. *Id.* at 2559-60. Noting that the majority had incompletely analyzed the interests of foreign nations, Justice Blackmun, quoted Chief Justice Marshall in The Schooner Exchange v. M'Faddon, 7 Cranch 116, 136 (1812):

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute . . . . Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction . . . .
>
> All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

Id. at 2562 n.12.

74. *Id.*

75. *Id.*

76. *Id.* at 2561.

77. *Id.* at 2559. Justice Blackmun contended:

> The majority finds plausible a reading that authorizes both a requesting and a receiving State to use methods outside the Convention. If this were the case,

overstating the effect of the restrictions executed pursuant to Article 23.[78] Furthermore, the minority argued that Article 9 was designed to protect the sovereign interests of foreign nations[79] which it believed the majority had incompletely analyzed.[80]

The dissenters stopped short of proposing that a litigant be required to utilize the provisions of the Hague Convention as a first resort,[81] but concluded there should be a general presumption favoring its use[82] unless there were strong reasons to believe that the Conventions procedures would be unsuccessful.[83] In those cases where the treaty could not resolve a particular conflict, a comity analysis would have to be utilized.[84] However, in most cases, such analysis would be unnecessary because the Hague Convention is the result of the political application of very same comity principles.[85]

Article 27(c), which allows a State to permit methods of taking evidence that are not provided in the Convention, would make the rest of the Convention wholly superfluous. If a requesting State could dictate the methods for taking evidence in another State, there would be no need for the detailed procedures provided by the Convention.

Id. at 2559 n.2.

78. *Id.* at 2565-66.

79. *Id.* at 2564.

80. *Id.* at 2562. Stated Justice Blackmun:

I am encouraged by the extent to which the Court emphasizes the importance of foreign interests and by its admonition to lower courts to take special care to respect those interests. Nonetheless, the Court's view of the Convention rests on an incomplete analysis of the sovereign interests of foreign States. The Court acknowledges that evidence is normally obtained in civil-law countries by a judicial officer, but it fails to recognize the significance of that practice. Under the classic view of territorial sovereignty, each State has a monopoly on the exercise of governmental power within its borders and no State may perform an act in the territory of a foreign State without consent.

Id. (citations omitted).

81. *Id.* at 2567.

82. *Id.* at 2568.

83. *Id.* at 2567. Justice Blackmun described his standard as follows:

The approach I propose is not a rigid *per se* rule that would require first use of the Convention without regard to strong indications that no evidence would be forthcoming. All to often, however, courts have simply *assumed* that resort to the Convention would be unproductive and have embarked on speculation about foreign procedures and interpretations. When resort to the Convention would be futile, a court has no choice but to resort to a traditional comity analysis. But even then, an attempt to use the Convention will often be the best way to discover if it will be successful, particularly in the present state of general inexperience with the implementation of its procedures by the various contracting States.

Id. (citations omitted).

84. *Id.* at 2562.

85. *Id.*

The Hague Convention entered into force with respect to the United States on October 7, 1972. Its espoused purpose was to span the differences between common law and civil law methods of obtaining evidence by providing procedures that would be "tolerable" in the country where the evidence was to be taken while producing information that was "utilizable" in the courts of the forum nation.[86] The treaty received the wide-spread support of numerous legal organizations and was unanimously ratified by Congress.[87] This overwhelming support may be considered the result of difficulties and perils associated with international discovery prior to its promulgation. Necessarily, a complete understanding of the Convention must begin with an examination of international discovery before 1972.

The first method of obtaining evidence abroad was the Letter Rogatory, which requested a foreign court to take evidence from specified witnesses.[88] This procedure was never viewed favorably for several reasons. The first was that the Letters Rogatory traveled through diplomatic channels which were often slow, inefficient, and costly.[89] Additionally, the evidence was taken in accordance with the procedures of the foreign nation and was usually inadmissible in American courts.[90] It was also quite possible that the time, effort, and money expended would be a wasteful exercise in futility because many foreign courts refused to compel unwilling witnesses to provide evidence.[91] Faced with the difficulties of Letters Rogatory and the

86. Report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law, 8 Int'l Legal Materials 785, 806 (1969). Taking evidence abroad had long been a concern because of the "marked differences between common law and civil law concepts and methods of taking evidence. Some countries [had] insisted on the exclusive use of the complicated, dilatory and expensive system of Letters Rogatory or Letters of Request. Other countries have refused adequate judicial assistance because of the absence of a treaty or convention with the United States." Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 A.B.A.J. 651, 651 (1969).

87. 107 S. Ct at 2549. The Hague Convention was supported by the American Bar Association, the National Conference of Commissions on Uniform State Laws, the Judicial Conference of the United States, and a number of various state and local bar associations. *Id.*

88. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 519 (1953).

89. *Id.* at 529.

90. *Id.* at 519. In 1964 Federal Rule of Civil Procedure 28(b) and the provisions of 28 U.S.C. §§ 1781 and 1782 were amended to allow foreign litigants the benefits of the federal rules without a requirement of reciprocity. Amram, *supra* note 86, at 651.

91. Jones, *supra* note 88, at 521; *see also*, Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031, 1054 (1961).

high probability of their failure, most American attorneys chose instead to use the provisions of Federal Rule of Civil Procedure 28(b) which provides three ways by which depositions may be taken ia a foreign country.[92] This approach, although preferrable because it did not involve the judiciary of a foreign nation or diplomatic channels,[93] had serious limitations. The first limitation was that the production of documents was not allowed under Rule 28(b).[94] A second limitation was that, although parties to the litigation could be compelled to testify, American courts lack the power to compel a non-cooperative third party who is not a national or a resident of the United States to testify.[95] However, the most serious impediment to the use of the provisions of the Federal Rules is that they are completely inoperable unless the country in which discovery is sought allows their use.[96] The possible hazards presented by this were increased by the fact that federal and state rules did not warn the practioners that these procedures could be used "only if and as foreign law permits".[97]

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92. Prior to 1964, Rule 28(b) provided:

> In a foreign State or country, depositions shall be taken (1) on notice before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or (2) before such person or officer as may be appointed by commission, or (3) under letters rogatory. A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in [here name the country].

In 1964 the rule was amended to liberalize its methods of obtaining evidence and to lessen the requirements necessary to the admissibility of evidence obtained through its procedures. FED. R. CIV. P. 28(b) *advisory committee's note.*

93. Jones, *supra* note 88, at 519.

94. Smit, *supra* note 91, at 1053. For an exception to this rule *see* note 95 *infra.*

95. Smit, *supra* note 91, at 1053. A United States resident or citizen abroad may be compelled by subpeona to testify or produce documents under 28 U.S.C. § 1783. Carter, *Existing Rules and Procedures*, 13 INT'L LAW. 5, 8 n.6 (1979). In the case of a non-cooperating third party witness not coming within the provisions of § 1783 compulsion could only emanate from a foreign court pursuant to a letter rogatory. Smit, *supra* note 91, at 1054.

96. Carter, *supra* note 95, at 13. Specifically Carter stated, "The authorizations of Federal Rule 28(b) are meaningless if they cannot be matched with a right to act in the specific foreign nation in question." *Id.* Depositions may often require a determination of foreign law and procedure which can be very expensive and time consuming. Jones, *supra* note 88, at 522-23.

97. Jones, *supra* note 88, at 519. In 1963 the Advisory Committee Note to FED. R. CIV. P. 28(b) was amended to include the following warning:

> Some foreign countries are hostile to allowing a deposition to be taken in their country, especially by notice or commission, or to lending assistance to

This conflict between American and foreign law has spawned what has become known as "legal tourism"—a surreptitious gathering of evidence by one not authorized to carry out such a judicial act in a foreign civil law country.[98] Legal tours are often engaged in for purposes of conducting sweeping and unguided discovery.[99] Although foreign nations have seldom taken steps to curb such activity, risks do inhere in it. A legal tourist may find himself facing criminal prosecution in a civil law country for usurping a judicial function.[100] Additionally, he may find that the souvenirs of his tour will be successfully precluded from admittance into evidence[101] or ultimately, that he holds an unenforceable judgment.[102] Some may find justification for the activity in the laxity of foreign attempts to curtail legal tourism, however, such attendant risks should never be completely overlooked.[103]

With this perception of the time, expense and dangers involved in international discovery before the Hague Convention, it is not surprising that the treaty received wide-spread support in this country.

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the taking of a deposition. Thus compliance with the terms of amended subdivision (b) may not in all cases ensure completion of discovery abroad. Examination of the law and policy of the particular foreign country in advance of attempting a deposition is therefore advisable.

FED. R. CIV. P. 28(b) *advisory committee note.*

98. Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigation in the United States*, 13 INT'L LAW. 35, 35 (1979).

99. *Id.* at 45.

100. *Id.* Borel & Boyd contend:

> These irregular practices are known to French Authorities who, so far, have taken no action to limit them. However, such practices involve certain risks to which attention should be drawn . . . . The French Minister of Justice could decide that the lawyers involved, deemed to be without any lawful authority to engage in such acts, would be subject to criminal proceedings in France. Such a proceeding may be brought under Article 258 of the Penal Code which imposes a punishment of two to five years imprisonment for anyone who, without lawful authority, interferes with public, civil or military functions. To date, no prosecution of this type has ever been undertaken.

Id.

101. *Id.*

102. *Id.* A foreign court may deny enforcement because the judgment was rendered on evidence obtained in violation of the nation's public policy. *Id.*

103. Jones, *supra* note 88, at 520-21. United States courts and litigants often incorrectly assume that American procedures can be projected into foreign nations and that testimony may be taken at will. In 1949 three Dutch lawyers were imprisoned in Switzerland, charged with usurping the sovereign functions of the Swiss Government and "economic espionage" as a result of conducting depositions. Their release was finally obtained only after an official apology was made by the Dutch Government. Shortly after this, American courts ordered commissions for depositions in Switzerland without any realization of the danger. *Id.*

The Hague Convention was intended to "bridge the gap" between the judicially conducted discovery of civil law nations and the privately conducted discovery of common law nations.[104] The cornerstones of the document were "accomodation" and "cooperation" in international discovery.[105] The negotiating history of the treaty shows that its drafters proceeded with a keen eye toward the protection of judicial sovereignty,[106] to establish a set of minimum standards for assistance in conducting international discovery.[107] The treaty provides that evidence may be taken through Letters of Request[108] or by diplomatic officers or commissioners,[109] but its history does not indicate whether it is to provide mandatory procedures for use in obtaining evidence abroad.[110]

By placing the Hague Convention and the Federal Rules of Civil Procedure within their proper historical context, the flaws in the majority's reasoning in *Societe Nationale* become more apparent. Initially, there are indications that the majority may have an incorrect perception of the history of international discovery.[111] It appears that the silent tolerance of American discovery procedures by civil law nations has led many to incorrectly presume that these procedures

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104. *See, e.g.*, Report of the United States Delegation, *supra* note 86, at 806.

105. Preamble to the Hague Convention on Taking Evidence Abroad, 23 U.S.T. at 2557.

106. Report of the United States Delegation, 8 Int'l Legal Materials, at 806.

107. *Id.* at 808. The United States Delegation noted:

> While the proposed Convention provides a substantial number of improvements over existing practice, it is most important to emphasize that the Convention is designed to set minimum standards for international assistance.
>
> Any country may unilaterally offer by internal law and practice, wider, broader, more liberal and less restrictive international assistance.

Id.

108. Hague Convention on Taking Evidence Abroad, *Articles* 1-14, 23 U.S.T. at 2557-64.

109. Hague Convention on Taking Evidence Abroad, *Articles* 15-22, 23 U.S.T. at 2564-68.

110. Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, *reprinted in*, 24 Int'l Legal Materials 1668, 1678 (1985). Although an attempt was made by the delegates at the meeting to resolve the issue of whether the treaty's provisions should be considered exclusive no agreement could be reached. *Id.*

111. 107 S. Ct. at 2551 n. 16. The majority noted, "At the time the Convention was drafted, Federal Rule of Civil Procedure 28(b) clearly authorized the taking of evidence on notice either in accordance with the laws of the foreign country or in pursuance of the law of the United States." *Id.* The Court also refers to the "broad discovery powers" American courts enjoyed prior to the Hague Convention. *Id.* at 2552.

have been openly embraced.[112] This overstatement of American judicial interests has a severe impact upon the final results reached under the Court's particularized comity analysis. It inflates American sovereign interests while down-playing the sovereign interests of a foreign nation, and, in essence, creates the pro-forum bias of which Justice Blackmun warned. This inaccurate perception is also a contributing factor to the majority's incorrect construction of Article 23[113] of the Convention.[114]

The majority finds further support for its position by construing Article 27 [115] to apply to both the requesting and receiving nations.[116] The history of the Hague Convention provides strong evidence to suggest that this interpretation is incorrect:

> [S]tudies had made clear that no country could be expected to abandon its historical method of taking evidence and its local practice and procedure. What should be asked was that a country agree, in international litigation, to follow as closely as possible the practice and procedure of the requesting State, in order that the evidence might be taken in a manner which most closely approached the technique of the forum where the action was pending.[117]

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112. Petition for a Writ of Certiorari at 56a. The French Consul in the United States has stated:

> [R]ecall first that international judicial assistance can take place only with respect for the sovereignty of each State and particularly for the principle of the territoriality of laws, and consequently for a judicial authority of one State to demand the production of documents or information that are under the jurisdiction of a foreign State, without its authorization and without respecting the procedures in force in that State, would constitute under international law an infringement of the sovereignty of that State.

Id.

113. *See supra* note 53.

114. 107 S. Ct. at 2552. The majority held that the treaty could not be exclusive in part because Article 23 allowed foreign nations the right to refuse to execute Letters of Request for "pre-trial" discovery. *Id.* Subsequent delegations concerning the treaty have found that the term "pre-trial" is understood in many countries as meaning "before the inititation of a lawsuit." *Id.* at 2565-66 n.21. Such language difficulties were anticipated by the drafters of the Convention:

> [E]ach language has special words of art perfectly clear to the lawyers and judges who employ that language, but which can be reproduced in another language only by using a circumlocution or by using that language's special terms of art. Also, in one language a single word may clearly define a legal concept which if "translated" into a single word of another language would be totally misleading and wrong.

Report of the United States Delegation, 8 INT'L LEGAL MATERIALS, at 805.

115. *See supra* note 54.

116. 107 S. Ct. at 2552-53 n.4.

117. Report of the United States Delegation, 8 INT'L LEGAL MATERIALS, at 806. *See also* Amram, 55 A.B.A.J. at 655.

Other evidence contradicting the majority's view includes the expressed desire to preserve those aspects of a receiving nations internal law that are favorable to foreign litigants and the importance of not rendering the treaty superfluous.[118]

Justice Stevens' opinion is also guided by his concerns of creating "three unnacceptable asymmetries".[119] Though persuasive at first glimpse, a closer analysis shows these concerns to be of far less importance than the majority presumes. The first of these asymmetries is virtually rendered a nullity when it is recalled that the procedures of the Federal Rules were made available to foreign litigants without a requirement of reciprocity as early as 1964,[120] while American litigants were left to conduct their discovery on the ever-shifting winds of international comity. Early in its opinion, the Court noted that a motivating force behind the Hague Convention was the desire to improve procedures for international discovery,[121] however, here the treaty was viewed as imposing a penalty upon American parties.

The Court's second asymmetry deals with the desire that both foreign and domestic companies compete on an equal basis. While it is not clear that the extent of discovery procedures truly creates a competitive edge for a foreign corporation in the marketplace, if it is assumed that it does, there is still little reason to believe that this justifies the derogation of the Hague Convention to an optional status. A judge may use his discretionary powers to control discovery and promote fairness[122] and, as will be discussed more fully below, the treaty contains provisions allowing a party to request the use of special procedures.

The majority's third asymmetry most clearly displays the Court's erroneous view of the history of international discovery. In stating that a litigant dealing with a foreign party from a non-contracting nation is in a more favorable position than a litigant dealing with a contracting nation the Court misperceives the purpose of the Hague Convention[123] and overstates the international applicability of the Federal Rules of Civil Procedure. In actuality it is the litigant seeking

118. 107 S. Ct. at 2559 n.2.
119. *See supra* note 56.
120. Amram, 55 A.B.A.J. at 651.
121. 107 S. Ct. at 2548.
122. *Id.* at 2567.
123. *Id.*

discovery from a noncontracting State that is disadvantaged by the absence of the treaty's procedures.[124]

The majority of the Court also appears to be of the opinion that the use of the Convention would "subordinate the Court's supervision of even the most routine of these pretrial proceedings to the actions or, equally, to the inactions of foreign judicial authorities."[125] This presumption is not necessarily true, however. Article 9 of the Hague Convention allows a requesting court to specify any special methods or procedures it would like the court of execution to use.[126] Article 10 guarantees that a certain amount of compulsion will be used by a foreign State to execute the request.[127] Under the wording of Article 10 it may, nonetheless, be possible for the courts of a foreign nation to refuse to execute a Letter of Request. Under the provisions of Article 5 of the treaty the reasons for refusing to execute the Letter of Request must be specified and communicated to the requesting State.[128] It is only in these instances of a failure in the Convention's procedures that a comity analysis conducted by the requesting State may be appropriate.[129]

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124. *Id.* Responding to the majority's fear of treating similarly situated parties differently, Justice Blackmun stated, "Dissimilar treatment of litigants similarly situated does occur, but in the manner opposite to that perceived by the Court. Those who sue nationals of noncontracting States are disadvantaged by the unavailability of the Convention procedures. This is an unavoidable inequality inherent in the benefits conferred by any treaty that is less than universally ratified." *Id.*

125. *Id.* at 2553.

126. Article 9 provides:

> The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.
>
> However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

The history of the provision shows that "incompatible with" is not to be read to allow a nation to disregard the special request unless a clear and direct conflict with internal law exists. Report of the United States Delegation, 8 INT'L LEGAL MATERIALS, at 810.

127. Hague Convention on Taking Evidence Abroad, *Article* 10, 23 U.S.T. at 2561.

128. Hague Convention on Taking Evidence Abroad, *Article* 5, 23 U.S.T. at 2560.

129. 107 S. Ct. at 2562. In a situation such as this, the failure of the Convention's procedures may indicate that the political balancing of sovereign interests which the treaty represents has become skewed. This may provide justification for an American court to apply a traditional comity analysis and use compulsion or sanction a party under FED. R. CIV. P. 37. *Id.* Such measures, however, may not be available to an American court in regards to a non-party

Finally, the majority assumes that the procedures of the Convention will be "unduly time consuming and expensive, as well as less certain to produce needed evidence than the direct use of the Federal Rules".[130] The Court offers no support for this statement and the record discloses only one such admittedly "atypical" occurence.[131] The available evidence supports the conclusion that the treaty operates satisfactorily[132] and, although it does not appear to have been used sufficiently to make a conclusive determination,[133] the treaty's history discloses that it was designed to operate quickly and cheaply.[134] The majority acknowledges that there will be times when more evidence can be obtained more quickly under the procedures of the Hague Convention,[135] however, they fail to provide any reasons for this belief that some instances of discovery are better suited for the provisions of the treaty than others.

In light of the historical reluctance of American litigants to use the procedures of the Hague Convention when conducting discovery abroad, the practical effect of the decision in *Societe Nattionale* will most likely be to provide a justification for the continued disregard

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witness over whom it has no jurisdiction. *See supra* note 95. Further, the minority stated:

> When there is a conflict, a court should seek a reasonable accomodation that reconciles the central concerns of both sets of laws. In doing so, it should perform a tripartite analysis that considers foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning regime.

107 S. Ct. at 2562.

130. *Id.* at 2555.

131. *Id.* at 2556 n.20. Justice Blackmun also noted that the Federal Rules of Civil Procedure do not always operate inexpensively. *Id.* at 2565.

132. Boyd, *Contemporary Practice of the United States Relating to International Law*, 72 AM. J. INT'L L. 119, 134 (1978). Quoting a United States Department of Justice memo, Boyd states:

> Our experience with the Evidence Convention has been extremely gratifying. In all respects, the Convention appears to be a great step forward in the area of international judicial assistance in civil and commercial matters.

Id.

133. *Id.* Records show that between October 1,1976 and September 1, 1977 the Justice Department executed 74 requests for evidence pursuant to the Hague Convention from signatory and non-signatory nations despite the availability of the more liberal federal discovery procedures. *Id.* Up until 1979 it appears that less than 25 Letters of Request were dispatched by American litigants. Borel & Boyd, *supra* note 98, at 45.

134. Report of the United States Delegation, 8 INT'L LEGAL MATERIALS, at 806; Report on the Second Meeting of the Special Commission, 24 INT'L LEGAL MATERIALS, at 1670.

135. 107 S. Ct. at 2555 n.26.

of the treaty. The Court's comity analysis, based upon a built-in pro-forum bias, largely ensures that the provisions of the Convention will seldom be used and continues the American affront to foreign sovereignty known as legal tourism. Although change may be had through diplomatic channels or unilaterally by Congress or foreign governments, the limited appellate review of discovery orders all but ensures that the decision will remain virtually unassailable in America's courts. Foreign acquiescence to American discovery orders is likely to continue, but as Justice Blackmun noted, it may "carry a pricetag of accumulating resentment, with the predictable long-term political cost that cooperation will be withheld in other matters. Use of the Convention is a simple step to take toward avoiding that unnecessary and undesirable consequence."[136]

Michael P. Lehutsky

136. *Id.* at 2568.